

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ROBIN LANGLEY, No. 2:10-cv-03060-MCE-KJN

Plaintiff,

v.

ORDER

SENTRY CREDIT, INC.,

Defendant.

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This action proceeds against Defendant Sentry Credit, Inc. ("Defendant"), on Plaintiff Robert Langley's ("Plaintiff") First Amended Complaint, which alleges violations of the Federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq., and the Rosenthal Fair Debt Collection Practices Act, California Civil Code § 1788, et seq. Presently before the Court is Plaintiff's Motion for Leave to Amend Complaint (ECF No. 18).<sup>1</sup> For the following reasons, Plaintiff's Motion is GRANTED.

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<sup>1</sup> Because oral argument will not be of material assistance, the Court orders this matter submitted on the briefing. E.D. Cal. Local Rule 230(g).

## BACKGROUND

Plaintiff originally initiated this action as an unfair debt collection practices case that was based on Defendant's purportedly harassing telephone calls to Plaintiff. On July 28, 2011, this Court issued a Pretrial Scheduling Order ("PTSO") setting July 6, 2012, as the deadline for completion of non-expert discovery, September 6, 2012, as the deadline for expert disclosure, December 6, 2012, as Defendant's dispositive motion filing cut-off, and May 6, 2013, as the date for trial. In the PTSO, the Court also specified that "[n]o joinder of parties or amendments to pleadings is permitted without leave of court, good cause having been shown." PTSO, 1:24-25.

Plaintiff subsequently served Defendant with discovery requests, including a request for the production of any recordings of Defendant's phone calls to Plaintiff. Defendant served its responses to those requests on October 26, 2011. Plaintiff thereafter served follow-up requests for production to Defendant to learn whether Defendant had employed any pre-recorded messages informing Plaintiff the calls to her might be recorded. On approximately December 22, 2011, Plaintiff received Defendant's subsequent responses, which confirmed that Defendant had failed to warn Plaintiff her telephone calls were being recorded or to obtain her consent to do so.

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At that point, Plaintiff sought and retained experienced class counsel who associated in the matter on January 20, 2012. Shortly thereafter, on January 31, 2012, Plaintiff filed her instant Motion for Leave to File a Second Amended Complaint, by which she seeks to add four class-based causes of action arising out of Defendant's allegedly illegal recording of class members' confidential telephone conversations without their consent. Two of Plaintiff's proposed causes of action are alleged on behalf of a California class pursuant to California Penal Code § 632, which prohibits the recording of confidential telephone calls without all parties' consent, and the right to privacy included in California Constitution, Article I, Section I. One of her other proposed claims is alleged, as an alternative to the California class claims, on behalf of a nationwide class under Washington Revised Code § 9.73.060, and the final proposed cause of action is alleged on behalf of both classes under a negligence per se theory. Plaintiff's Motion is now GRANTED, and she will be permitted leave to add these class claims.

## **STANDARD**

22       Typically, leave to amend should be "freely give[n]...when  
23 justice so requires." Fed. R. Civ. Pro. 15(a)(2). Once a  
24 district court has filed a pretrial scheduling order pursuant to  
25 Rule 16, as this Court did here on July 28, 2011, however, the  
26 standards set forth by Rule 16 control. Johnson v. Mammoth  
27 Recreations, Inc., 975 F.2d 604, 607-08 (9th Cir. 1992); see also  
28 PTSO, 1:24-25.

1       “Unlike Rule 15(a)’s liberal amendment policy which focuses  
2 on the bad faith of the party seeking to interpose an amendment  
3 and the prejudice to the opposing party, Rule 16(b)’s ‘good  
4 cause’ standard primarily considers the diligence of the party  
5 seeking the amendment.” Johnson, 975 F.2d at 609. In explaining  
6 this standard, the Ninth Circuit has stated that:

7       [a] district court may modify the pretrial schedule ‘if  
8 it cannot reasonably be met despite the diligence of  
9 the party seeking the extension.’ Moreover,  
10 carelessness is not compatible with a finding of  
11 diligence and offers no reason for granting of relief.  
12 Although the existence or degree of prejudice to the  
party opposing the modification might supply additional  
reasons to deny a motion, the focus of the inquiry is  
upon the moving party’s reasons for seeking  
modification. If that party was not diligent, the  
inquiry should end.

13 Id. (citations omitted). To demonstrate diligence under Rule  
14 16’s “good cause” standard, courts have required movants to show  
15 that: 1) they were diligent in assisting the Court in creating a  
16 workable Rule 16 order; 2) despite their diligent efforts to  
17 comply, their noncompliance with a Rule 16 deadline occurred  
18 because of the development of matters that could not have been  
19 reasonably foreseen or anticipated; and 3) they were diligent in  
20 seeking amendment of the Rule 16 order, once it became apparent  
21 that they could not comply with the order. Jackson v. Laureate,  
22 Inc., 186 F.R.D. 605, 608 (E.D. Cal. 1999) (internal citations  
23 omitted).

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## **ANALYSIS**

According to Plaintiff, good cause exists to justify further amendment of her First Amended Complaint here because she did not know and could not have known prior to conducting discovery that her calls with Defendant were recorded. Plaintiff thus contends that in prosecuting her originally filed action, she diligently pursued discovery, which, on December 19, 2011, resulted in confirmation that Defendant had, without notice to her and without her consent, recorded her phone calls. Plaintiff thereafter promptly hired class counsel and filed her instant Motion. Plaintiff further argues that she is already preparing class-based discovery and that she intends to file her motion for class certification prior to May 23, 2012. Plaintiff thus avers that amendment of her FAC will not require modification of the deadlines set by the Court in the PTSO.

17       Defendant disagrees, of course, arguing Plaintiff has been  
18 dilatory in seeking amendment and that any amendment will be  
19 futile. More specifically, Defendant believes Plaintiff  
20 unjustifiably delayed bringing her instant Motion because she  
21 waited three months after receiving the recordings from Defendant  
22 and one year after filing this action to seek leave to amend.  
23 In addition, Defendant argues amendment will be futile in any  
24 event because this case is substantially similar to another  
25 pending class action filed in the Southern District of  
26 California, Allen v. Sentry Credit, Inc., 3:11-cv-02317-IEG-BLM.  
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1 The Allen case also asserts violations of California Penal Code  
2 section 632 and California Constitution, Article I, Section 1, as  
3 well as a negligence cause of action. Finally, according to  
4 Defendant, it will be prejudiced if Plaintiff is permitted to  
5 amend because it will be required to file a Motion to Strike or a  
6 Motion to Dismiss Plaintiff's class claims as duplicative of  
7 those raised in Allen. Defendant will also purportedly be forced  
8 to engage in extensive additional discovery and dispositive  
9 motion preparation, which would consequently require Defendant to  
10 later seek to modify the PTSO.

11 Plaintiff's arguments are well-taken. The record before the  
12 Court indicates that Plaintiff timely pursued discovery related  
13 to her existing fair debt collection claims and promptly sought  
14 leave to add her class claims only one month after she had  
15 obtained Defendant's responses indicating those causes of action  
16 might be viable. Moreover, even if the Court were to accept  
17 Defendant's argument that Plaintiff should have sought amendment  
18 upon receipt of the recordings themselves, rather than upon  
19 receipt of Defendant's responses indicating it did not utilize  
20 pre-recorded messages, the Court would still find the interests  
21 of justice served by permitting amendment are outweighed by the  
22 marginal delay between Defendant's October production of that  
23 evidence and Plaintiff's filing of her current Motion in January,  
24 particularly in light of Plaintiff's interim need to locate and  
25 retain class counsel. In any event, the Court finds no fault  
26 with Plaintiff's decision to expeditiously pursue confirmation as  
27 to the legitimacy of her class claims prior to calling upon the  
28 resources of this Court in seeking leave to amend.

1 Accordingly, especially given the fact that dispositive motions  
2 are not set to be heard until the end of this year and trial is  
3 not set to begin until next year, the Court finds Plaintiff was  
4 diligent in seeking leave to amend here.

5 The Court likewise rejects Defendant's contention that  
6 Plaintiff's Motion should be denied because her class claims are  
7 duplicative of those pending in the Allen case. First, this  
8 argument is really a substantive challenge to the proposed  
9 amended pleading that, while potentially appropriate in response  
10 to the Second Amended Complaint, once filed, is not proper in the  
11 context of whether Plaintiff should, as an initial matter, be  
12 permitted leave to amend. In addition, Plaintiff has advised the  
13 Court no class has been certified in that litigation.

14 Accordingly, while the Allen plaintiff may be pursuing putative  
15 class claims, it is entirely speculative to presume those claims  
16 will ever actually be litigated on behalf of the named class.  
17 Moreover, Defendant's "substantial similarity" argument is based  
18 on Plaintiff's California-based claims, but wholly ignores the  
19 fact that Plaintiff in this case seeks to add additional class  
20 claims, one of which arises under Washington law, on behalf of a  
21 nationwide class as well. Accordingly, this Court declines to  
22 find at this preliminary juncture that any amendment would be so  
23 futile as to justify denying Plaintiff's Motion.

24 Finally, Defendant's theory that it will be prejudiced by  
25 amendment is likewise rejected. There is still ample time prior  
26 to the dispositive motion deadline and the current trial date in  
27 which the parties can litigate this case.

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1 Discovery does not close for several months, and there is no  
2 indication at this time that any dates in the PTSO will at any  
3 point need to be modified. In addition, Defendant's attempt to  
4 characterize the potential for additional motion practice or  
5 discovery as "prejudicial" fails as well because Defendant has  
6 not described anything beyond what is part and parcel of any  
7 litigation. Accordingly, no persuasive arguments to the  
8 contrary, Plaintiff's Motion is now GRANTED.

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10 **CONCLUSION**

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12 For the reasons just stated, Plaintiff's Motion for Leave to  
13 Amend the Complaint (ECF No. 18) is GRANTED. Plaintiff is  
14 directed to file her amended complaint not later than five (5)  
15 days following the date this Memorandum and Order is  
16 electronically filed.

17 IT IS SO ORDERED.

18 Dated: April 20, 2012

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21 MORRISON C. ENGLAND, JR.  
22 UNITED STATES DISTRICT JUDGE  
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